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Burnett and Irene Blumer had a problem. In 1994, Irene had been admitted to a nursing home while Burnett remained in the community. At the time of admission, the couple had $145,644 of savings and investments—hardly a princely sum. However, Irene's nursing home care probably was costing $3,500 to $4,000 per month.

Finally, in December of 1996, when their savings and investments had dwindled to $89,335, Burnett applied for Medical Assistance on Irene's behalf. At the time of application, Burnett's monthly Social Security and Pension income was $1,324. The income from the "standard" community spouse resource allowance (CSRA), $72,822, was $315 per month.[1] Irene had a total monthly Social Security and Pension income of $1,263.

The application for Medical Assistance was denied on the grounds that the Blumer's assets exceeded the total that they were entitled to keep—$74,822 ($72,822 for Burnett and $2,000 for Irene).

The Fair Hearing

The Blumers requested a fair hearing and appealed the denial of Medical Assistance, arguing that under Sec. 49.455(8)(d), WIS. STATS., Burnett was entitled to retain additional assets to bring his monthly income up to the Monthly Minimum Maintenance Needs Allowance (MMMNA) which was $1,727 in 1996. At the fair hearing, they argued that even if Burnett retained all the additional assets over and above the CSRA, the additional assets would only generate another $63 of income, still leaving him below the MMMNA. The hearing examiner denied the Blumer's appeal on the grounds that the applicable Wisconsin Statute, Sec. 49.455(8)(d), required that before a community spouse is entitled to retain additional assets he/she must first take the maximum possible income allocation from the institutionalized spouse. This is the so-called "income first" rule. The hearing examiner held that this decision was compelled by the words of the Wisconsin Statute.

The Blumers appealed to the Circuit Court for Green County, which upheld the decision of the hearing examiner. The Blumers then appealed to the Wisconsin Court of Appeals.

Court of Appeals Decision

On June 8, 2000, the Wisconsin Court of Appeals reversed the decision of the Circuit Court.[2] On appeal, the Blumers argued that while they agreed that the Wisconsin statute in question mandated use of the income first rule, the income first rule itself was invalid since it was contrary to governing federal law.

To understand the basis for the Court of Appeals decision in Blumer, it is necessary to compare the federal and the state statutes relating to an increase in the CSRA. The "normal" CSRA is an amount equal to one-half of the couple's countable resources as of the date of institutionalization, with a floor of $50,000 and a ceiling that varies from year to year (in 1996 the ceiling was $72,822).[3] However, the maximum can be raised by a hearing examiner after a fair hearing. The Federal statute, 42 U.S.C. §1396r-5(e)(2)(C) states as follows:

> Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The comparable provision of the Wisconsin statutes is found at §49.455(8)(d) and reads as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under subsection (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under subsection (4)(c), the department shall establish an amount to be used under subsection (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under subsection (4)(c). *Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under subsection (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under subsection (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under subsection (4)(b), unless the institutionalized spouse makes all of his or her income ... available to the community spouse* ....(emphasis added)

The italicized material is the portion of the statute that creates the "income first" rule in Wisconsin. The Blumers argued, and the Court of Appeals held that the italicized portion of the Wisconsin statute is invalid because it is inconsistent with federal law.

The Blumers argued that the federal statute is unambiguous and that there is nothing in its language to justify the "income first" gloss applied by the second portion of the Wisconsin statute. The state argued that the federal statute is ambiguous and therefore it would be permissible to resort to the legislative history of the statute as well as administrative interpretations by the Health Care Financing Administration (HCFA—now the Center for Medicare Medicaid Services, or CMS) to support Wisconsin's use of the "income first rule."

The Court of Appeals rejected the State's claim that the statute is ambiguous on three grounds:

The non Wisconsin cases relied on by the State "reveal[] that the courts have stated their conclusions in broad strokes, such as opining that the spousal impoverishment provisions are complex; and therefore, it is impossible to attach a plain meaning to any provision. While we may agree that these provisions are complex, we cannot agree that every provision is ambiguous simply because of the complexity of the statute as a whole."[4]

The state also urged that the phrase "community spouse's income" in 42 U.S.C. §1396r-5(e)(2)(C) is ambiguous and could reasonably be interpreted to mean not only the income in the name of the community spouse but also income in the name of the institutionalized spouse that is available for allocation. The Court of Appeals rejected this argument as well. It pointed out that the income allocation from the institutionalized spouse to the community spouse is made only *after* eligibility is determined. Thus, Congress could not have meant to include the institutionalized spouse's income in determining whether the community spouse had enough income to satisfy the MMMNA for eligibility purposes if the income allocation did not take place until *after* eligibility was determined.

If Congress had wanted to include both the income of the institutionalized spouse and the community spouse, it could have said so—and it didn't.[5]

The "resource first" rule (meaning that the increase in the CSRA is determined without taking into account the institutionalized spouse's income) is consistent with the policy of the spousal impoverishment provisions since that rule makes provision for the often inevitable depletion of the community spouse's income at the death of the institutionalized spouse, especially when the institutionalized spouse has the larger income which may not continue to the same extent after the death of the institutionalized spouse. "Congress knew that to take all of the community spouse's assets to pay for the institutionalized spouse's nursing home care would be short-sighted, because the community spouse would need to turn to other public assistance programs to survive once the institutionalized spouse died. And, reliance on public assistance by the community spouse had been a result of spousal impoverishment, which the MCCA sought to change."[6]

The State petitioned for review by the Wisconsin Supreme Court, which declined. It then petitioned the U.S. Supreme Court for a writ of certiorari, which was granted.[7]

The United States Supreme Court Decision

The United States Supreme Court in a 6-to-3 vote reversed the decision of the Wisconsin Court of Appeals and held that while the federal law did not mandate the resource first rule (as urged by the Blumers), it permitted use of the income first rule by individual states, and that Wisconsin permissibly adopted the income first rule. The majority opinion was written by Justice Ginsburg, joined by Justices Rehnquist, Thomas, Souter, Breyer, and Kennedy. Justice Stevens wrote a dissent, in which Justices O'Connor and Scalia joined.

The decision in the Supreme Court turned on interpretation of the phrase "community spouse's income." It defined the issue as follows:

> The question presented is whether the income-first prescription of the Wisconsin statute, requiring that potential income transfers from the institutionalized spouse be considered part of the "community spouse's income" for purposes of determining whether a higher CSRA is necessary, conflicts with the MCCA. The answer to that question, the parties agree, turns on whether the word "community spouse's income" in §1396r-5(e)(2)(C) may be interpreted to include potential, post-eligibility transfers of income from the institu-

tionalized spouse permitted by §1396r-5(d)(1)(B).[8]

The Blumers had contended that the phrase "community spouse's income" meant the income in the name of the community spouse at the time of application, i.e. before eligibility had been determined. The Supreme Court disagreed. It first turned to the nuances of English grammar to support its rejection of the Blumers' arguments:

> Congress' use of the possessive case does not demand construction of "community spouse's income" to mean only income actually possessed by, rather than available or attributable to, the community spouse; to the contrary, the use of the possessive is often indeterminate. See J. Taylor, *Possessives in English: An Exploration in Cognitive Grammar* 2 (1996) ("[T]he entity denoted by a possessor nominal does not necessarily possess (in the everyday, legalistic sense of the term) the entity denoted by the possessee."); see also *Smiley v. Citibank* (South Dakota), N. A., 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).[9]

The Court then turned its attention to the Blumers' claim that the interpretation of DHFS was inconsistent with the structure of the statute as a whole.[10]

> In accord with the Secretary, we do not agree that Congress circumscribed the (e)(2)(C) [fair] hearing in the manner Blumer urges. Although that hearing is conducted pre-eligibility, its purpose is to anticipate the *post-eligibility* financial situation of the couple. The procedure seeks to project what the community spouse's income *will be* when the institutionalized spouse becomes eligible. See Tr. of Oral Arg. 14 (officer conducting (e)(2)(C) hearing makes a calculation that "concerns the post-eligibility period"; question is will "the at-home spouse ... have sufficient income in the post-eligibility period, or does the resource allowance need to be jacked up in order to provide that additional income"). The hearing officer must measure that projected income against the MMMNA, a standard that, like the CSMIA, is operative only post-eligibility. §§1396r-5(b)(2), (d)(3).[11]

Note that the Court did not state that the income first rule was required by federal law, or that the resource first approach was precluded. Rather, it held that states were free, consistent with the concept of "cooperative federalism," to experiment with different approaches under the Medicaid statute, such as the ability to use either "income first" or "resources first."[12] The Blumers had argued that resources first was mandated by federal statute (and that was really the only approach they could take under the circumstances of this case).

Writing in dissent, Justice John Paul Stevens was not impressed with the reasoning of the majority:

> There are two possible bases for arguing that the Wisconsin statute is consistent with §1396r-(e)(2)(C): first, that despite the express limitation in §1396r-5(d) to deductions authorized "[a]fter an institutionalized spouse is determined or re-determined to be eligible," Congress really meant "before or after"; and second, that when Congress used the term "community spouse's income" in §§1396r-5(e)(2)(C), it really meant "community spouse's income plus any deduction from the institutionalized spouse's income that may in the future be made available to him." As is clear, both of these arguments require altering the plain text of the statute.
>
> Rather than admitting that its reading strains the text of the MCCA, the Court engages in an analytical sleight of hand: It conceives of the transfer of income that is commanded by the Wisconsin statute as a condition of eligibility, not as a *required* transfer, but only as a *prediction* of things to come. *Ante*, at 16 ("In short, if the §§1396r-

5(e)(2)(C) hearing is properly comprehended as a pre-eligibility projection of the couple's post-eligibility situation, as we think it is, we do not count it unreasonable for a state to include in its estimation of the 'community spouse's income' in that post-eligibility period an income transfer that will then occur"). The Court's temporal manipulation of the §§1396r-5(e)(2)(C) hearing is innovative; but it is wrong for at least three reasons.[13]

In summary, these reasons are as follows:

- The majority's interpretation (creating a theoretical prediction of post eligibility income) is inconsistent with the Wisconsin Statute which requires that the community spouse "makes available" income requires the pre eligibility transfer of income, which requirement is prohibited by MCCA.[14]
- The institutionalized spouse is not required by federal law to transfer income to the community spouse, but is only permitted to do so. In fact, the transfer may not occur (I had such a case where a guardian for an institutionalized spouse would not permit the transfer because of a dispute with the community spouse). Thus the "predicted" transfer of income may never take place.[15]
- The position of the majority violates the Medicaid "name on the check" rule since only income in the name of a particular spouse is determined to be the income of that spouse.[16]

Finally, while the majority chose to pay "respectful consideration" to certain opinions of the Federal Secretary of Health and Human Services, the dissent suggested that those pronouncements should be given little weight:

> The Secretary has taken inconsistent positions on this issue over time, see App. to Pet. for Cert. 78a—90a, and the current opinion letter offers no analysis of the potentially conflicting provisions in the federal and state statutes. It is devoid of any "'power to persuade.'"[17]

Public Policy Consideration Not Considered

Neither the majority nor the dissent really addressed the public policy implications of adopting the "income first" rule rather than the "resources first" rule. The State Bar of Wisconsin Elder Law Section Amicus Brief[18] offered a rationale as to why the resource first rule is preferable to the income first rule for many community spouses.

Posit the following situation: Husband is in the nursing home. He has Social Security of $1,000 per month and a pension of $750 (which is a joint and fifty percent survivor annuity—the standard under the Retirement Equity Act). Wife has Social Security of $500 and no pension. The couple has $200,000 of assets.

Under the resource first rule, wife will probably be able to keep all of the $200,000, since at a five percent rate of return (a generous assumption in today's interest rate environment) it would generate only $833 per month of income, so that even with all of the assets her income would not equal the MMMNA (which is $1,990 this year). She would also get $657 of the husband's income to bring her up to the MMMNA. At her husband's death, she would have $1,000 of Social Security, $375 of pension income, and $833 of interest income for a total of $2,208, which could probably just about sustain her in an assisted living setting, with some use of principal from the investment.

If the income first rule is applied, she will have to spend down the $200,000 to $89,280 (which will generate $372 per month of income). During her husband's lifetime, she would get $1,118 from his income to bring her up to the MMMNA.[19] However, at the husband's death, her income would be $1,000 of Social Security, $375 of pension income and only $372 of investment income for a total of $1,747. Thus, she is $461 worse off at her husband's death, yet her monthly expenses in the community will not have decreased (and possibly may increase as she becomes older and has more health problems).

Will the state be any better off? In the first scenario (resource first) the husband contributes $657 per month to the wife's care, while in the income first scenario, he contributes $1,118, a difference of $461 per month that has to be made up by Medicaid while the husband is in the nursing home.

Furthermore, the wife will probably go on Medicaid sooner or will have to enter a nursing home because she doesn't have the assets to pay for care in a less costly setting. The state will argue that the application for husband's medical assistance will be delayed, but that assumption may also be flawed. Income first may very well encourage couples to divest earlier, even before nursing home care is a possibility, to preserve some assets for the family. Thus, all that may happen is that inadvisable divestment will take place and the husband will go on Medical Assistance at the same time he would have under the resource first scenario.

Where Are We Now?

Even with the Supreme Court *Blumer* decision, the issues surrounding increasing the CSRA will continue in cases where the combined income of the couple is less than the MMMNA (currently $1,990 to $2,283). This means that the issues that have arisen with the Department while *Blumer* was pending in the U.S. Supreme Court will continue to be pertinent.

The primary issue in this regard is the question of "non income producing assets." In a pair of "secretary reviewed" Fair Hearing Decisions—MRA-70/15380; MRA 05/35807—the Division of Hearings and Appeals, held that if a couple had more than $2,000 of "non income producing" assets, they were not entitled to an increase in the CSRA.[20] A review of the pertinent statutes, Sec. 49.455(8)(d), WIS. STATS. and 42 U.S.C. 1396r-5(e)(2)(C) does not show any legislative or regulatory basis for this argument. Nonetheless, the Department has persisted in its position.

The Department has found there to be an issue of "non income producing" assets in a number of situations:

- **Life Insurance Cash Value**[21] In these cases, the Hearing Examiner relied on a misreading of the POMS.[22] While the POMS treats dividends on life insurance policies as not being income, interest earned on the dividends is so treated. Since cash value is made up of accumulated dividends and interest, and since additional earnings are based on the entire cash value, even under the Department's reasoning Life Insurance Cash Value is income producing. Note that in a case where the applicant presented evidence of how the cash value was computed, an increase was allowed.[23]

- **Dividend and Interest Reinvestment from Stocks and Bonds**[24]

- **Annuity Not in Pay Status**[25] Showing that they are not always consistent, in this case the Department treated an annuity contract not in pay status, as an income-producing asset because it was generating a "reasonable rate of return."

- **Income Not Paid Monthly**[26] In this case, dealing with life insurance cash value, the policies paid dividends which could have been paid out on a monthly basis, but were not. The Department held that the applicant was not entitled to an increase in the CSRA.

The Dane County Circuit Court has provided a partial answer to the "non income producing asset" dilemma.[27] In *Rung*, the Court held that an applicant must be given reasonable opportunity to convert non income producing assets into income producing assets, before the increase in the CSRA can be denied. Thus, for example, if you have life insurance with more than $2,000 of cash value,[28] you could take a policy loan for the cash value and put it in a savings account; or, if you have the option, have the dividends on the policy paid monthly.

If you are caught in a situation where there has been a denial of the CSRA increase due to this rule, I would recommend an appeal to the Circuit Court challenging the underlying position of the Department since it seems to be totally baseless.

Conclusion

The Supreme Court's decision in *Blumer* was unfortunate—and in the long run, may cost the states more rather than less. How this works out in practice remains to be seen.

Endnotes

1. One-half of the total assets at the time of institutionalization. WIS. STAT. § 49.455 (6)1996.
2. Blumer v. Dep't of Health & Family Services, 237 Wis. 2d 810, 2000 WI App. 150, 615 N.W.2d 647 (Ct. App. 2000) *pet. for review denied*, 239 Wis. 2d 309, 619 N.W.2d 92 (2000), *rev.'d*, Wisconsin Dept. of

Health and Family Services v. Blumer, 534 U.S. 473, 122 S.Ct. 962, 151 L. Ed. 2d 935, 70 U.S.L.W. 4139, (NO. 00-952).

3. Wis. Stats. § 49.455(6)1996.
4. 237 Wis. 2d at 822, 615 N.W.2d at 652.
5. *Id* at 822-823, 615 N.W.2d at 652-653.
6. *Id* at 826-827, 615 N.W.2d at 653-654.
7. *Id* at 810, 615 N.W.2d 647.
8. 122 S.Ct. at 972.
9. *Id.*
10. *Id* at 969. The Blumers had argued that since you do not get to the question of transfer of the institutionalized spouse's income until after eligibility is determined, only the amount of the preeligibility income of the community spouse should be considered.
11. *Id* at 973.
12. *Id.* at 975.
13. *Id.* at 978-979.
14. *Id.* at 979.
15. *Id.* at 979-980.
16. *Id.* at 980.
17. *Id.* It is interesting to note that after taking no official rulemaking action on this issue, which has been argued in the courts for years, during the pendency of this litigation, CMS issued proposed regulations. 66 Fed. Reg. 46,763 (Sept. 7, 2001). To date, no final regulations have been issued.
18. This brief was drafted by Elder Law Section member, Sarah Buscher, a Madison lawyer.
19. This assumes that the $200,000 was used to pay for nursing home care. If some Medicaid planning took place, the $110,000 excess assets would either be divested or possibly used to purchase a commercial annuity for the wife, which would provide some increase in income, at the price of putting the wife in a very inflexible investment and not giving her the flexibility to pay for non nursing home care (at home care or assisted living) from the principal assets.
20. MRA-70/15380; MRA 05/35807. It should be noted that these decisions are available on the Division of Hearings and Appeals Web site *at* http://dha.state.wi.us/static/Default.htm (last visited May 29, 2002).
21. MRA-70/15380; MRA 05/35807; MRA 68/48394.
22. POMS is the Social Security Program Operations Manual System which provides guidance to Social Security case workers. It is similar to the Medical Assistance Handbook used by the County workers. POMS SI 00830 500C deals with the treatment of interest and dividends in the life insurance context.
23. MRA 14/48121.
24. MRA 57/49992.
25. MRA 13/50545.
26. MRA 34/49409.
27. Rung v. Dep't of Health & Family Services, No. 00 CV-2362 (August 31, 2001).
28. Presumably, this would be nonexempt life insurance, since the exempt insurance ($1,500 or less of face value) simply won't count.